No. 4000

In the United States

Circuit Court of Appeals

For the Ninth Circuit

D. PINCOLINI and J. PINCOLINI,
Plaintiffs in Error,

Vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Plaintiffs in Error

McCARRAN & MASHBURN,
Attorneys for Plaintiffs in Error.

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STATEMENT OF CASE

Some of the above named Plaintiffs in Error were conducting a hotel situated at or near No. 214 Lake Street, Reno Nevada, on August 2, 1922, and for several months both prior and subsequent

thereto, known as and called "Mizpah Hotel." The Indictment filed in the case was against four defendants, to wit A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. The defendant Susie Pincolini was and is the wife of J. Pincolini. There was a soft drink place, a dining hall, a kitchen, a lobby of the hotel and perhaps some other rooms on the lower floor, a stairway leading down into the basement from one of the back rooms of the building and another leading from the lobby of the hotel and the hotel proper to bedrooms upstairs. The testimony shows that the defendant A. Pincolini conducted the upstairs portion, or lodging house, of the establishment, and that neither J. Pincolini nor D. Pincolini had anything to do with that part of the business. It shows that the building was owned by the defendants J. Pincolini, D. Pincolini and A. Pincolini jointly with a brother by the name of Everesto Pincolini, the latter not being one of the defendants. It also shows that the soft drink and other part of the business which was conducted downstairs was owned by J. Pincolini. It also shows that Everesto Pincolini had nothing whatever to do with either the hotel, lodging house, soft drink business or any other business conducted in the building. It shows that the only connection D. Pincolini had with any business conducted there was his employment as night clerk for the hotel or lodging

house business, and that he occasionally cleaned up the halls upstairs and the floor of the soft drink establishment. In other words, neither defendant D. Pincolini nor defendant Susie Pincolini owned or conducted any business at that place or in that building, although Susie Pincolini was one of the chambermaids in the hotel or lodging house portion of the building.

On August 16, 1922 an Indictment was filed in the District Court of the United States in and for the District of Nevada, charging the defendants A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini with having violated the "National Prohibition Act" on or about August 2, 1922, in said Mizpah Hotel at Reno, Nevada. The Indictment was on four counts the FIRST COUNT charging a conspiracy among the defendants to violate the law in the particulars charged in the Second, Third and Fourth Counts; the SECOND COUNT charging possession of intoxicating liquors; the THIRD COUNT charging the sale of intoxicating liquor; and the FOURTH COUNT charging the keeping for sale of intoxicating liquors, by defendants.

Upon the trial by jury defendants A. Pincolini and Susie Pincolini were acquitted on all counts charged in the Indictment; but the jury found defendants J. Pincolini and D. Pincolini guilty as charged in the Second, Third and Fourth counts, to wit, Guilty of possession, sale and keeping for

sale of intoxicating liquors as charged.

A Motion in Arrest of Judgment and a Motion for a New Trial were duly made by defendants (Transcript of Record Pages 28-39) and both were thereupon overruled or denied by the Court. The Court then pronounced its Sentence and Judgment that each of the defendants, J. Pincolini and D. Pincolini (Plaintiffs in Error herein) be imprisoned in the County Jail of Washoe County, Nevada, for a period of five months and pay a fine of five hundred ($500.00) dollars. (Transcript of Record, Pages 24-25 and Pages 39-41). Plaintiffs in Error herein J. Pincolini and D. Pincolini thereupon and thereafter duly filed their Assignment of Errors (Transcript of Record, Pages 41-52) and their Petition for a Writ of Error (Transcript of Record Pages 54-55) and the Court made and entered its Order allowing the Writ of Error (Transcript of Record, Pages 56-57) Bail and Cost Bond having been given and approved (Transcript of Record Pages 57-66) and Citation to Writ of Error was duly served (Transcript of Record Pages 68-70) The time of said Plaintiffs in Error for the filing and settlement of their Bill of Exception was extended from time to time by Stipulation and Order of Court until March 20, 1923, when it was settled and signed by the Court, and thereupon filed as such Bill of Exception.

ARGUMENT

Without waiving any of the Errors assigned or any Assignment of Error set forth in the Assignment of Errors on file herein, we wish to call particular attention to the following:

ASSIGNMENT NO. IX:

This refers to questions asked by the Assistant United States Attorney on cross examination of defendants' witness James Boyd which we believe belittles him in the eyes and opinion of the jury, without cause and was error prejudicial to the defandants. This witness had testified that he had rented room No. 16 in the Mizpah Hotel, a bedroom upstairs, and occupied it at the time of the raid by the prohibition agents. This was the room in which the officers testified they found liquor on the floor and a lot of broken bottles at the time of the raid. The witness Scott had testified that an acquaintance of his from Truckee, whom he had known and worked and slept with at Lake Tahoe, came to the Mizpah Hotel and complained to him of his inability to secure a room in Reno; that he told him that he (Scott) had a large double room and offered to share it with him, and his acquaintance accepted the offer. That he went down to get his baggage, and when he returned he had a grip and a sack with liquor in it; that, after some mild protest, Scott allowed the man to remain with him in the room something like two days and nights,

notwithstanding the liquor, and that he actually bought and drank some of it himself; that none of the Pincolinis knew anything about the liquor being there; and that when the raid was made, and he heard it in progress, the witness broke the containers of the liquor himself, allowing the liquor to escape on the floor, leaving the inference that that was the liquor found by the officers and a portion of the liquor introduced in evidence at the trial of the case. Then the following questions were asked by the Assistant United States Attorney with the following objection, ruling and exception, which questions and ruling we assigned as error:

> "Q. I presume you broke these bottles that day because you realized you were breaking the law that you had intoxicating liquor in your possession?
>
> A. I will tell you why I broke them; I broke them to protect the house as well as myself, for I had it there in the rooms; that is why I tried to destroy it.
>
> Q. You realized somebody needed protection at that time did you?
>
> A. Well, I realized I needed it, in a way, you understand.
>
> Q. You realized you were breaking the law didn't you?
>
> A. Not at that time I didn't know; I just didn't know only to destroy that stuff, that is all; that is all I thought about; not only to protect myself but to protect the house, because I had it there unbeknownst to them people.

Q. Did you think at that time you had a perfect right to have that kind of liquor in your possession?

A. I didn't think much about it.

Q. You never had heard of the prohibition law had you?

A. Yes, sir.

Q. Never had heard that the prohibition law prohibited your having moonshine whiskey in your possession?

A. Oh yes.

Q. You did know that your possession of that liquor was unlawful didn't you.

A. Well it must have been.

Q. And you know now when you are giving your testimony that you are making an admission that you yourself have broken the prohibition law, do you not?

A. I suppose I have.

Q. Do you realize right now that if we had the Marshal put you under arrest on the charge of having possessed liquor on that day, there would be nothing for you to do but enter a plea of guilty?

I am getting at his state of mind.

Mr. SALTER.—Objected to: he is not presumed to know the law in this case, or what would happen to him.

The COURT.—I will OVERRULE the objection.

MR. SALTER.— Exception.

The COURT.—Note the exception.

(By direction the reporter reads the question.)

The COURT.—Can you answer that question?''

(Transcript of Record Pages 77-78.)

We submit that the questions asked of this wit-

ness certainly unnecessarily belittled the witness in the eyes and opinion of the jury, and tended to bring the witness into disrepute with the jury and, therefore, improperly prejudiced the defendants and their interests.

ASSIGNMENT NO. XII:

This refers to the action of the Assistant United States Attorney in asking, and the action of the Court in permitting him to ask of Plaintiff in Error J. Pincolini, a witness on behalf of defendants recalled for further cross examination the following question:

> "Q. Now calling your attention to that particular day, whenever it was, that the officers were there and searched, do you recall having had a conversation with officers Brown and Nash that day there in the vicinity of the Mizpah Hotel, in which you said to them in substance at least, 'Well, you didn't find anything did you?' to which Mr. Nash replied in substance, 'No, but we found plenty of indications in the back room and cellars, I guess you will not deny that you had it there, you will surely get caught if you keep it up,' and to which you replied, 'Well, I don't consider that it is committing a crime to sell liquors, and will keep on selling as long as I am out of jail,' to which Mr. Nash replied to you, in effect, 'All right, if that is the way you feel about it'?"
> (Transcript of Record Pages 90-91.)

We submit that the objection made to this question (Transcript of Record Page 91) was well

taken and should have been sustained, and that said Plaintiffs in Error were prejudiced by the action of the Court in overruling it. It certainly could not have been either competent, relevant or material what the witness said to the officers at that time almost six months before the time when it is charged the offense was committed. The mere asking of defendant whether he did not say to the officers at that time that he would keep on selling liquor as long as he was out of jail must have prejudiced the jury, regardless of what his answer might have been. Then, too, he got before the jury the pretended statement of the officers that they found "plenty of indications" that defendants had had liquor there on the occasion of this former visit to their place, both of which matters were certainly inadmissible in evidence in this case.

ASSIGNMENT NO. XIII:

This relates to the action of the Trial Court in denying the motion for a new trial on the grounds stated in the Motion. We shall deal particularly with subdivisions "(a)", "(c)", "(d)", "(e)" and "(f)" of the Tenth Ground stated in the Motion for a New Trial (Transcript of Record Pages 48-51) relating to what we believe to be improper instructions given to the jury or instructions improperly given to the jury by the Trial Court.

We concede that Federal Judges may comment upon the evidence. That is a right which they have exercised for many years at least. But still we maintain that it is the province of the jury to

determine the facts and the weight to be given the evidence; while it is the province of the Judge or Court to instruct as to the law. This is a province of the Judge and of the jury, respectively, even in the Federal Court. In the sequence of the procedure at the trial, the Government has the opportunity for both the first and also the last impression on the mind of the jury,—the accusation the opening statement, the first testimony, and then the closing or rebuttal testimony. Then in the sequence of the argument at the trial the Government again has the first and also the last impression on the mind of the jury the opening argument and also the closing argument, even without the comment of the Court on the evidence. The District Judge in this District is a splendid man and an able Judge and lawyer. Before he was elevated to the Bench, he was an advocate of great ability and practiced with marked success before the Courts of this and other states. His reputation for integrity as a man and citizen is as enviable and unimpeachable as is his reputation as a Judge, lawyer and advocate. His comment to the jury has great weight and influence, no matter whether it be an instruction as to the law or a mere comment or expression of his opinion as to a fact and the evidence sustaining it. When this comment takes the form of an expression of his opinion as to the weight to be given the evidence on a particular point or as to the result of evidence on that point, or as to what, in his opinion, the evidence establishes, it immediately assumes in the mind of the jury the form and proportions of an instruction

as to that fact, and a direction as to what verdict the jury should return, or at least a suggestion which the ordinary jury will be almost sure to follow. To the jury it is the application of the facts to the law by a trained mind, the trained mind of the man and lawyer in whom the jurors have the utmost confidence. To them it is the expression of such a man and mind, both as to the weight of the evidence and the result established by the evidence, and also as to the law. It does not make any difference how such a Judge and man hedges about his expression of opinion with "ifs" and conditions. Neither does it make any difference how often or how clearly the Court instructs the jury that it is to follow its own judgment as to the facts, "not the judgment of the Court or the judgment of counsel, or what counsel may have said or what the Court may have said" Neither does it make any difference how much emphasis the Court may place upon an instruction that the jury is the sole judge of the weight to be given the evidence, or that it alone is to determine what facts are established by the evidence. If such a Judge instructs the jury as to the fact, the jury immediately accepts the opinion of the Judge, for they have confidence in him both as a man and as a Judge. When he expresses an opinion as to what the evidence establishes, the jury immediately accepts it as the opinion of a mind trained in the law and experienced in determining matters of controversy, no matter how much the Court or Judge may hedge about his expression of opinion

by "ifs" or conditions.

It is especially dangerous for such a Judge to comment upon the evidence or to express his opinion as to what it establishes, when his instructions to the jury are given orally from the Bench. In such situations his comment and expressions of opinion as to the evidence and facts are so commingled with his instructions as to the law that it is impossible for the jury to segregate the one from the other. In other words, it is impossible for the jury to know what portion of the observations made by the Court from the Bench constitutes instructions as to the law, and what portion of these observations constitutes mere comment or the expression of opinion by the Court as to the facts and evidence and the weight to be given the facts. In such a situation, there is nothing to indicate to the jury what are instructions and what is mere comment, and such a comingling of instructions as to the law and mere comment or expressions of opinion as to the evidence and weight to be given it and as to the facts is particularly prejudicial when the observations of the Court are so general in their nature as they were in this particular case. As an example of this comingling of instructions and comment, we cite the following quotations: "There has been an abundance of evidence on the Third Count in the Indictment, of making sales;" and then almost immediately following and in the very next sentence the Court uses this language: "As you have been informed repeatedly it is your duty to accept the law as it is given

you by the Court; you cannot question the law as it is given to you; you must follow the instructions of the Court."

We call particular attention to the last clause in the last above quotation, to wit: "You must follow the instructions of the Court." It will be noted that the Court does not limit "the instructions of the Court" which the jury are told that they "must follow" to instructions as to the law. The jury is positively told that it "must follow the instructions of the Court." When the comment or expression of an opinion by the Court is so closely followed by such an instruction, we submit that it cannot be otherwise than prejudicial to the defendants. In other words, the Court tells the jury that there is sufficient evidence ("an abundance of evidence") to sustain the Third Count of the Indictment, the Count charging the defendants with the making of sales of intoxicating liquor, and then almost immediately tells the jury that it "must follow the instructions of the Court." Under such circumstances as these we submit that it was certainly error which was prejudicial to the defendants for the Court to so intermingle his expressions of opinion or comment on the evidence with his instructions as to the law.

With these observations in view we quote the instructions of the Court as follows:

> "In determining whether there was a conspiracy you are to consider all the conduct of the parties; you will consider the locked door, if you think any of the doors were locked; you

will consider the conduct of Joe Pincolini with reference to this matter; you will consider the conduct of Dante and Adowaldo, and of the lady Mrs. Pincolini; and I think you would also consider the character of the establishment, the soft-drink place in front, the door and kitchen in the rear. That is a large room, the only furniture apparently being a sink, with a drainboard and running water, a cupboard and two shelves. You should also consider the bottles; the bottle that was found in the sink and the contents of that bottle. There is testimony that one of the milk bottles contained something smelling like alcohol. There were also a number of other bottles. One of the legs of the sink has been presented in evidence. I think it is something that should be considered by the jury in determining what the room was used for. You will notice neither end of the leg of the sink shows any nail marks; that leg has been there for a long time; it is hollow and can be taken out and put back again without destroying any nails, or any permanent fastening. The other leg is of the same character, and each leg is capable of being used to hide a bottle, perhaps several. You will also consider the sink and the running water, and the bottles there. Then I think it would be very proper for you to consider the testimony as to persons going from that back room to the door at the north, thence upstairs, if they went upstairs and coming back with the glasses, and with liquor if you believe that testimony.

There is no question about there being liquor in room 16. It is also a matter of significance that the liquor in that room was destroyed just at the time this raid was made, and that one of the defendants was there. If you consider the testimony of the witness Boyd, who

admitted that a friend of his had taken liquor up to room 16, isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the first time that he had ever had that room, that he only stayed there until this raid was made, then disappears from the house, and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming. These are all matters for you to consider in determining, not only whether there was a conspiracy on the part of these defendants; but also to determine whether that was a place kept for the purpose of selling intoxicating liquor. . . . .

"Mr. Scott has testified as to two purchases made in April. Mr. Hogue has testified as to a sale that was made on the 2d day of August. If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on these dates. . . . .

"There has ben an abundance of evidence on the third count in the indictment, of making sales; and there has been a denial of those sales. As you have been informed repeatedly it is your duty to accept the law as it is given you by the Court; you cannot question the law as it is given to you; you must follow the instructions of the Court. As to questions of fact, it is your duty to determine what the evidence proves, and you are to follow your own judgment, not the judgment of the Court, or the judgment of counsel, or what counsel may have said or what the Court may have said; you are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render";

(Transcript of Record, Pages 93-96.)

Subdivision ("a"):

The error assigned in this subdivision has been discussed to a considerable extent in the general observations made under this Assignment No. XIII.

However, we wish to urge the injury and danger of this statement. Certainly, as to the Third Count of the Indictment, namely the selling of intoxicating liquor, this statement invades the province of the jury, and determines an essential fact which should be determined by the jury. In effect, it took away from the jury the right to determine whether the evidence did establish the fact that defendants sold liquor as charged, the right to determine whether the evidence was sufficient to establish that fact. Because of the splendid reputation of the Judge in this particular case, and the confidence reposed in him by the public generally, and, necessarily by the jury it also, in fact, determined that issue. The Court's language of which we complained in this particular is as follows:

> "There has been an abundance of evidence on the Third Count in the Indictment, of making sales."
> (Transcript of Record, Page 95.)

The Court could not have told the jury any plainer or in more complete terms that the evidence was sufficient to sustain the charge of selling intoxicating liquor.

That statement must have had its effect on the

jury in determining also the guilt or innocence of Plaintiffs in Error on the Second and Fourth Counts of the Indictment, namely, the charge of possession of intoxicating liquor and that of keeping intoxicating liquor for sale. Certainly, if they sold it they must have kept it for sale; and, certainly, if they sold it and kept it for sale, they must have had possession of it. This conclusion necessarily follows. This is certainly the fact when taken in connection with what the Court told the jury that the testimony of Scott and Hogue showed. Which is as follows:

> "Mr. Scott has testified as to two purchases made in April. Mr. Hogue has testified to a sale that was made on the 2nd day of August. If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on these dates."
>
> (Transcript of Record, Page 95.)

So, when the Court told the jury that there was sufficient evidence ("an abundance of evidence") of the making of sales of intoxicating liquor by Plaintiffs in Error, it necessarily conveyed to the minds of the jury the idea that the statement also meant that there was sufficient evidence, in the opinion of the Court, to establish also the charges of the possession and of the keeping for sale of intoxicating liquor. Since the only three counts of the Indictment upon which Plaintiffs in Error were convicted were the sale, the possession, and the keeping for sale, of intoxicating liquor and since the jurors must have understood that the

above quoted statement of the Court applied to the possession and the keeping for sale, as well as to the sale of such liquor, the whole verdict must have been the result of this statement of the Court, or at least must have been influenced by it. For the foregoing reasons, we submit that the statement was error by which Plaintiffs in Error were prejudiced and injured.

The Federal Courts of this country and also the Supreme Court of the United States have spoken in no uncertain terms on the points involved in this Assignment of Errors as follows:

> "But the cases agree that one qualification must always be borne in mind: All disputed facts must ultimately be submitted to the determination of the jury. If a dispute exists concerning a fact, the judge must leave the jury free. He may not himself decide the dispute or draw the inference. (Underscoring ours.) If he does, and if this action is prejudicial, he falls into such error as requires the judgment to be set aside. And this, we cannot avoid believing, is what happened in several particulars at the trial of this case."
>
> Fuller vs. N. Y. Life Ins. Co. 199 Fed, at Pages 900-901.
> Starr vs. U. S. 153 U. S. 614; 38 L. Ed. at Page 845.

In stating that it is the duty of the judge to separate the law from the facts, and not comingle one with the other, Chief Justice Fuller, in the last above mentioned case, says:

"But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province." (Citing M'Lanahan vs. Universal Ins. Co. 26 U. S. 1 Pet. 170, 182; 7 L. Ed. 98, 104). "As the jurors are the triers of facts, expressions of opinion by the Court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made to distinctly understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to."

Starr vs. U. S., 153 U. S. 614; 38 L. Ed. at page 845.

Subdivision ("c"):

This relates to the use of the following language by the Court:

"If each knew that the intoxicating liquor was there and it was kept there with his knowledge, and they were engaged in the business, the possession of one would be the possession of the other."
(Transcript of Record, Page 49.)

This language was used in an instruction relating to the proof of possession of intoxicating liquor, and the necessity of proving actual possession and knowledge of possession by each of the defendants. The objectionable feature of this instruction is that it is not limited to a situation or condition where defendants have been proven to

have been engaged in the business together or jointly, and did not contain the element of joint business, or business in which the defendants concerned in the transaction were jointly engaged.

Subdivision ("d"):

In the Court's instruction to the jury, the following language was used:

> "You are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render."
>
> (Transcript of Record, Pages 95-96.)

Our objection to this instruction is that it does not contain the words "as to what the law is" or words of similar import after the word instructions, and especially we contend that this is necessary after the Court had told the jury that there was "an abundance of evidence on the Third Count in the Indictment, of making sales." Since the instructions as to the law were so comingled with the comment of the Court or the Court's expression of opinion with reference to the facts and the evidence, and as to what the evidence established, we submit that the Court erred to the prejudice of the defendants in giving this instruction without so limiting it. Especially is this true in view of the fact that the Court states what certain testimony showed.

Subdivision ("e"):

In the case of Starr vs. U. S., supra, Chief Justice Fuller points out the danger of the Court comingling with its instructions as to the law argumentative matter relating to and discussing the evidence. In the case at bar the Court used the following language:

> "Isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the first time that he had ever had that room, that he only stayed there until this raid was made, then disappears from the house, and is not there again as a tenant until the case comes on for trial; three days he has been there, and there is one day coming."
>
> (Transcript of Record, Pages 94-95.)

We submit that this comment of the Court is entirely argumentative and certainly tends to prejudice Plaintiffs in Error.

Subdivision ("f"):

In the Court's instructions to the jury or its comment the following language was used in calling the attention of the jury to the interest of the defendants in the case, and in suggesting as an inducement for them to testify as they did in the case, an attempt on their part to shield from the consequences of a violation of the law, and any instruction given as to what elements they should

take into consideration in weighing the testimony in this case:

> "Whether it is an attempt on his part to shield himself from the consequences of a violation of the law."
> (Transcript of Record, Page 51.)

Our contention is that it was error prejudicial to Plaintiffs in Error for the Court to call the attention of the jury to the interest that the defendants might have in this case, and to reasons which must have induced them to testify falsely, without, at the same time, calling the attention of the jury to the interest that the Prohibition Officers might have had in justifying their conduct in making the raid and to procure a conviction upon the Indictment which they had secured, and their anxiety in this regard.

Respectfully submitted,

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